

## PRICING LAW OUTLINE

- **ROBINSON-PATMAN ACT**

- Overview

- Once supplier elects to do business with a reseller, supplier cannot:
      - Discriminate in price among competing resellers (or other purchasers), or
      - Discriminate in availability of promotional allowances, services or facilities among competing resellers
    - Jurisdictional limitations
    - Competitive injury limitations
    - Affirmative defenses

- Robinson-Patman Act Section 2(a)

- It shall be unlawful for any person
      - engaged in commerce
      - to discriminate in price
      - between different purchasers
      - of commodities
      - of like grade and quality
      - where such commodities are sold for use, consumption, or resale within the United States and
      - where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them.

- Discrimination in Price

- “Discrimination” is nothing more than a *difference* in price. Effect on competition and possible defenses may be considered but not at this jurisdictional stage.
    - “Price” means anything affecting cost to the buyer (credit terms, discounts, rebates, costs of delivery).
    - Differences in terms or conditions of sale may become a cognizable “indirect” price discrimination.
    - Some other forms of discrimination that do not involve “price” may be challenged under other sections of the Act.

- Discrimination Between Different Purchasers

- There must be at least two actual *purchases*. The Act does not reach mere price quotations or offers that do not result in two consummated *sales*.
    - Consignees, lessees or licensees are not “purchasers.”
    - Sales to certain “indirect purchasers” may be covered *if* the seller exercises significant control over the transaction and there is some relationship between the seller and the indirect purchaser.

- The Act may reach sales *by* two related units of the same corporation to two different purchasers at different prices.
  - The two sales must take place contemporaneously.
- Commodities
  - Coverage is limited to sales of commodities.
  - Inapplicable to services, financial instruments, insurance and real estate.
  - Several “grey areas” -- print advertising, electricity, and “mixed” sales of goods and services.
  - When might a “license” of software become a “sale” of a “commodity”?
- Like Grade And Quality
  - Minor differences are disregarded. The preferences and perceptions of consumers, affecting their willingness to pay different prices, are the chief determinants of “like grade and quality.”
  - Brand name product and private label products which are otherwise similar or identical are treated as of “like grade and quality,” even if there is consumer preference for the branded product.
  - Customized product can be made for one purchaser without obligation to do the same for other purchasers.
- Injury To Competition
  - Price discrimination can injure competition between
    - Discriminating seller and its competitors (primary-line)
    - Favored and disfavored customers of discriminating seller (secondary-line)
    - Their respective customers (tertiary-line)
  - Standards of proof for primary, secondary and tertiary line injury vary dramatically
- Primary Line Injury
  - Brooke Group: landmark case
  - Injury to competition: **ONLY** predatory pricing
    - Pricing below cost
    - Likelihood of recoupment
  - Heavy burden
- Secondary Line Injury
  - Competition between favored and disfavored customers
  - Competition affected when seller sells to wholesalers and retailers at different prices
    - Wholesaler as disfavored purchaser
    - Retailer as disfavored purchaser
  - Injury to a competitor vs. injury to a market
  - inferring competitive injury (the “Morton Salt inference”)
    - Evidence to support inference
    - Rebutting the inference

- Different Kinds Of Price Discrimination:
  - Off-invoice discount
  - End-of-period rebate
  - Credit terms
  - Price protection
  - Stocking/slotting payment
- Meeting Competition Defense
  - Section 2(b) of RP Act: defense to an otherwise unlawful discrimination in price or in provision of services or facilities if seller can prove the discrimination was “made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”
  - This defense allows “meeting” -- not “beating” -- the price (or furnished service/facility) for a competing comparable product.
  - Good faith requires a reasonable basis to believe the seller’s terms only meet the competitor’s terms:
    - Desirable to attempt to verify the competing terms by soliciting information from the customer but not from the competitor.
    - Need to update the reasonable basis if the discrimination is to continue for a long time.
    - Desirable to implement routine program for documentation on all meeting-competition situations.
  - Good faith is ordinarily a jury issue, so difficult as a basis for summary judgment against discrimination claims.
  - Defense is available to acquire new as well as retain old customers.
  - Defense is available to implement an area-wide lower price if a “reasonable and prudent” seller would believe the competitor’s lower price was generally available throughout that area and throughout the period that the seller offers its lower price.
  - Defense not available if the seller knows or has reason to believe the competitor’s price it seeks to meet is itself an unlawful price.
- Cost Justification Defense
  - Section 2(a) provides that a seller may defend price differentials upon proof that the lower prices to some purchasers “make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which” the products at issue “are to such purchasers sold or delivered.”
  - Seller must meet exacting standards of proof that the actual cost savings in selling to the favored purchasers match or exceed the difference in price between those purchasers and disfavored purchasers.
  - Seller can use average cost comparisons between reasonably defined classes of purchasers to defend prices to particular purchasers within a class shown to involve average lower costs.

- Differing “methods” that can involve cost differentials and thus support corresponding price differentials may include, for example, differences in manufacturing arrangements, mode of delivery, and sales promotion or selling expenses.
- “Quantity” discounts are difficult to justify under this defense: might work for differences between carload vs. less-than-carload shipments but almost never for cumulative or annual volume commitments.
- This defense is available for price differentials under Section 2(a), but not for promotional allowance or service differentials under Section 2(d)–2(e) (or brokerage violations under Section 2(c)).
- Functional Discount Defense
  - Discount given to purchaser who performs distributive functions for seller, but not given to purchasers not performing any such functions can be defended as not causing likelihood of competitive injury if amount of the discount bears a reasonable relationship to cost of performing the functions.
  - Main example: special discount for wholesaler performing warehousing and delivery functions and reselling to retailers but not given to retailers reselling only to end-users.
  - Wholesaler that resells both to retailers and to end-users should receive special discount only on that portion of its purchases that is resold to retailers.
- Functional Availability Defense
  - Seller can defend a lower price to particular purchasers upon showing that the lower price was meaningfully available to competing purchasers -- hence either no cognizable discrimination or no causal competitive injury.
  - Availability of the lower price must be known to the competing purchasers.
  - Lower price must be reasonably attainable -- functionally and not only theoretically -- to the competing purchasers.
  - Basis for defending some but not all quantity discounts.
  - Application to discounts for exclusivity or other loyalty commitments.
- Changing Conditions Defense
  - Section 2(a) allows price differentials “in response to changing conditions affecting the market for or the marketability of the goods concerned, such as . . . deterioration of perishable goods, obsolescence of seasonal goods, distress sales” or sales “in discontinuance of business in the goods concerned.”
  - Most common use is change in saleability due to product perishability or other obsolescence.
  - Can be used for goods undergoing technological obsolescence -- selling off old model, making room for new model.

- Courts are divided on applicability to changed conditions in the market generally, e.g., declining overall demand.
- Illegal Brokerage
  - Section 2(c) prohibits a seller from granting to a buyer or its agent, and prohibits a buyer or its agent from receiving, “anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof except for services rendered . . . .”
  - Main purpose is to prohibit large buyers from setting up fictitious brokerage entities as ruse for receiving special discounts or commissions; clearly reaches brokerage paid to buyer or agent on purchases for buyer’s own account.
  - No need to prove either discrimination or injury to competition.
  - Exception for “services rendered” is narrowly construed and otherwise murky.
  - Application to commercial bribery situations.
  - Conflict over application to “slotting fees.”
- Buyer Liability
  - Section 2(f) prohibits a buyer “knowingly to induce or receive a discrimination in price which is prohibited by” Section 2(a) of RP Act.
  - Buyer not liable unless it knows the seller is in violation of the Act because of the discriminatory price being granted including, for example, knowledge that the seller does not have a valid meeting-competition defense.
  - Buyer may engage in hard bargaining to induce a seller’s grant of discriminatory price BUT should not lie to the seller about a competitor’s lower price offer.
  - Buyer’s knowing inducement of a seller’s unlawfully discriminatory grant of promotional allowances or services is not reachable under Section 2(f) but may be reachable under Section 5 of the FTC Act.
- Discrimination Regarding Promotions
  - Section 2(d): unlawful to pay anything of value to or for the benefit of a customer as compensation or in consideration for any services or facilities furnished by or through such customer “unless such payment or consideration is available on proportionally equal terms to all [competing] customers.”
  - Section 2(e): unlawful “to discriminate in favor of one purchaser against another purchaser” of a commodity bought for resale by “furnishing or contributing to the furnishing of any services or facilities... upon terms not accorded to all purchasers on proportionally equal terms.
  - Key Elements

- Promotional allowances, services and facilities must be offered to all competing resellers on proportionally equal terms.
  - Proportional equality determined by costs to supplier or reseller.
  - No “competitive injury” requirement for violations.
  - Meeting competition may be a defense
- Who is a Customer?
  - Sections 2(d) and 2(e) cover all competing “customers” of a seller.
  - FTC’s Guides for Advertising Allowances and Other Merchandising Payments and Services define a customer as “any person who buys for resale directly from the seller, the seller’s agent or broker” and also “any buyer of the seller’s product for resale who purchases from or through a wholesaler or other intermediate reseller.”
  - The Guides define “competing customers” as “all businesses that compete in the resale of the seller’s products of like grade and quality at the same functional level of distribution regardless of whether they purchase direct from the supplier or through some intermediary.”
- Promotional Allowances and Services
  - Payments and services relating to the supplier’s *original* sale of the product are not covered. Payments and services must relate to the resale of the product.
  - Among the allowances and services that are within the scope of Sections 2(d) and 2(e) are funds for advertising, providing demonstrator services, prizes and sweepstakes, lead referrals, advertising in customer-owned publications, shelf space payments, spiffs, posters or displays and other forms of in-store advertising.
  - Arrangements outside the scope of Sections 2(d) and 2(e) include discriminations in delivery times, discriminatory freight allowances, discrimination in allocation of the product among buyers, and discrimination in credit terms
- Proportionally Equal Terms
  - The FTC Guides provide that the seller should have a plan which fulfills the following requirements:
  - payments or services must be available on proportionally equal terms to all competing customers;
  - the seller must take action to inform all competing customers of the existence and essential features of the plan;
  - the plan must furnish alternatives if the basic plan is not functionally available to all competitors;
  - in informing customers of the details of the plan, the seller should provide sufficient information to give a clear understanding of the exact terms of the offer, including alternatives; and

- the seller should take reasonable precautions to see that services are actually performed and that the seller is not overpaying for them.
- **EXCLUSIONARY CONDUCT**
  - Overview:
    - Firm with “monopoly power” can be liable for unlawful monopolization and firm with “market power” can be liable for unlawful “attempted” monopolization when it:
      - Engages in “exclusionary conduct” impairing rivals’ ability to compete and
      - Lacks a “valid business justification” for its actions
    - Usual need to show anticompetitive effect, antitrust injury
    - Types of cases:
      - DOJ, FTC, State AG Enforcement Actions
      - Competitor, consumer class actions for treble damages
  - What is Exclusionary Conduct?
    - Can be anything other than competition “on the merits” of your own product
      - Conduct foreclosing rivals’ access to distribution outlets, essential supplies, or other means of marketing their products and reaching customers
      - Conduct that “raises rivals’ costs”
      - Conduct capable of excluding equally efficient rivals
      - Any conduct that would not be profitable or otherwise beneficial to the defendant but for its elimination or suppression of competition
      - Any conduct capable of making a significant contribution to the creation, maintenance or enhancement of monopoly power
  - What is a Valid Business Justification?
    - Reducing Costs
    - Improving product performance
    - Otherwise enhancing customer satisfaction
    - Genuine product innovation
    - Focus on “efficiency”
    - Need for credible contemporaneous documentation supporting:
      - Valid purpose
      - Likely effect
  - Risk Management:
    - Identification of all market spaces where smaller rivals can assert that you enjoy market power
    - Proposed plans/strategies
      - Ask about purpose
      - Ask about expected effects
    - Avoid bad documents (including emails)
    - Create good documents:

- Reflecting valid purpose
- Reflecting expected effects
- Control communications with third parties